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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

SOLDIER OF FORTUNE MAGAZINE, INC.
and OMEGA GROUP, LTD.,
Petitioners,
v.
MICHAEL F. BRAUN and IAN BRAUN,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF AMICI CURIAE OF THE NATIONAL NEWSPAPER ASSOCIATION, ALABAMA PRESS ASSOCIATION, AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, ASSOCIATION OF ALTERNATIVE NEWS WEEKLIES, FREEDOM TO READ FOUNDATION, HIGH TIMES MAGAZINE, MAGAZINE PUBLISHERS OF AMERICA, INC., NEWS WORLD COMMUNICATIONS, INC., NEWSLETTER PUBLISHERS ASSOCIATION, INC., RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, TIME INC., AND VV PUBLISHING CORPORATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Amici adopt by reference the Question Presented set forth in the Petition for Writ of Certiorari at page i.

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INTEREST OF THE AMICI CURIAE

Amici curiae and their members are the publishers of newspapers, magazines and other periodicals, broadcasters and cablecasters, and the operators of bookstores and libraries throughout the United States. *See Appendix infra.* If the decision below is not reversed, these *amici* and their members will be adversely affected in their ability to disseminate constitutionally protected expression to the public.

STATEMENT OF THE CASE

The June 1985 edition of *Soldier of Fortune* magazine ("SOF") contained 284 classified advertisements, one of which stated:

> GUN FOR HIRE: 37 year old professional mercenary desires jobs. Vietnam Veteran. Discrete and very private. Body guard, courier, and other special skills. All jobs considered. Phone (615) 436-9785 (days) or (615) 436-4335 (nights), or write: Rt. 2, Box 682, Village Loop Road, Gatlinburg, TN 37738.

Michael Savage, the 37-year old Vietnam Veteran who placed the ad with SOF for $46.00, was subsequently hired by a group of persons planning the murder of one Richard Braun. Thereafter, Savage was present when another person shot Braun to death and wounded one of his sons. Braun's wounded son and his brother instituted a civil action against SOF for negligently publishing Savage's ad.

On August 13, 1992, the United States Court of Appeals for the Eleventh Circuit upheld a jury verdict awarding plaintiffs $2,375,000 in compensatory damages and $2,000,000 in punitive damages against SOF.[1] A majority of the three-judge panel, over the dissent of Judge Eschbach, held that:

> [T]he First Amendment permits a state to impose upon a publisher liability for compensatory damages

[1] The jury had actually awarded $10 million in punitive damages, but the trial court remitted that award to $2 million.

> for negligently publishing a commercial advertisement *where the ad on its face, and without the need for investigation, makes it apparent that there is a substantial danger of harm to the public.*

Braun v. Soldier of Fortune Magazine, Inc., 968 F.2d 1110, 1119 (11th Cir. 1992) (emphasis added).

SUMMARY OF ARGUMENT

In the present case, the Court of Appeals has held, for the first time, that the First Amendment permits crippling damages to be assessed against third-party publishers whenever the information they disseminate constitutes a "commercial advertisement" by another that "on its face" makes apparent "a substantial danger of harm to the public." Although the Court of Appeals articulated this novel rule of constitutional law in the context of a solicitation for employment by a self-described "gun for hire" who subsequently participated in the commission of a violent crime, the reach of its First Amendment jurisprudence is not, and cannot logically, be limited to such cases. In fact, as *amici* describe more fully below, the Court of Appeals' recalibration of the First Amendment freedoms afforded third-party disseminators of the "commercial" expression of others is in conflict with applicable decisions of this Court and jeopardizes the ability of the average American to communicate to a broad audience.

First, the Court of Appeals' precise holding—that expression by advertisers that "makes . . . apparent . . . a substantial danger of harm to the public" is unprotected by the First Amendment in a civil damages action against the third-party publisher of such an advertisement—creates a new category of unprotected expression never before recognized by this Court. Even when demarcating the boundaries of expression that is regulable because it proposes a commercial transaction, this Court has taken pains to explain that its analysis does not apply to third parties that do no more than disseminate the commercial proposals of others. The Court of Appeals'

standard, in contrast, works directly upon the third-party disseminator, be it a newspaper, broadcaster, cablecaster, magazine, "alternative" media publication or bookstore proprietor, launching into unchartered water that the Court of Appeals neither explores nor appears to appreciate.

Second, the line of demarcation between protected and unprotected expression drawn by the Court of Appeals is so vague and inherently subjective that it is impossible to apply consistently, rendering it inevitable that protected expression falling close to that line either will never be disseminated at all or will become the subject of adverse jury verdicts and damage awards. Indeed, the latter consequence of the Court of Appeals' decision will be visited most harshly on those unpopular defendants that provide an inviting target for jury antipathy to the controversial content of their publications generally. There is certainly nothing in the Court of Appeals' standard that limits its application to those commercial messages that create a risk of violent crime or, for that matter, a risk of any illegal conduct at all; it expressly sweeps away constitutional protection for all "commercial" expression that a jury deems to raise "a substantial danger of harm to the public," of whatever sort.

Third, as a practical matter, most—if not all—third-party disseminators of commercial information, including those represented by *amici*, will be unable to absorb the enormous costs of the abstruse, if not impossible, analysis contemplated by the Court of Appeals. Instead, they will be compelled to abandon publication of whole categories of advertising, or else raise markedly the price of such advertising to offset the dramatically increased costs of the scrutiny mandated by the Court of Appeals. In either event, the forum for the dissemination of information to a broad audience now most hospitable to the average American—the classified advertisement—will become endangered, depriving the public of an astonishing array of messages that reflects the diversity of the citizenry that can presently afford to purchase one.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CREATES A NEW CATEGORY OF UNPROTECTED SPEECH, WHICH IS IN CONFLICT WITH THE DECISIONS OF THIS AND OTHER APPELLATE COURTS.

As this Court recognized most recently in *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2543 (1992), the First Amendment's otherwise broad proscription of government regulation of expression is tempered "in a few limited areas." One of those "limited areas" encompasses so-called "commercial speech," that category of expression which "propose[s] a commercial transaction." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976). So defined, "commercial speech" is subject to reasonable government regulation, at least when it advertises unlawful activity or is otherwise false or "misleading." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980).[2]

This Court has, however, taken pains to avoid extending the regulable category of commercial speech to encompass claims asserted, not against the advertiser that proposes an allegedly harmful "commercial transaction," but directly against a third-party publisher that does no more than provide a forum through which the advertiser communicates its message to a broader audience. In *Bigelow v. Virginia*, 421 U.S. 809, 829 (1975), for example, this Court reversed the criminal conviction of a Virginia newspaper editor and publisher who disseminated an advertisement for abortion services available in New York. In so doing, the Court expressly emphasized

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[2] While this Court has recognized that commercial advertising that expressly proposes an illegal transaction may be prohibited, *see, e.g., Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 389 (1973), it has afforded First Amendment protection to advertisements for products and services that could be, but are not necessarily, employed for an unlawful purpose. *See, e.g., Carey v. Population Servs. Int'l*, 431 U.S. 678, 701 (1977).

the constitutional significance of the distinction between publisher and advertiser. When governmental regulation purports to operate, not against an "advertiser or referral agency or a practitioner," but against the "publisher and editor of a newspaper," this Court held, it implicates "more serious First Amendment" interests and enhances the "strength" of the constitutional right at stake. 421 U.S. at 828 n.14.

From the perspective of commercial speech theory, as consistently articulated by this Court, the distinction between advertisers and third-party publishers is indeed of constitutional magnitude. The commercial expression of advertisers is subject to more intrusive governmental scrutiny precisely because it is "the sine qua non of commercial profits" and is therefore less likely to be inhibited. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. at 771 n.24. By contrast, publishers that merely disseminate the speech of others have little incentive to risk a crippling damage award in exchange for a few dollars of advertising revenue. *Id.* Moreover, unlike advertisers, the third-party publishers of commercial speech are not at all well "situated to evaluate the accuracy of [the] messages and the lawfulness of the underlying activity." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. at 564 n.6.[3]

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[3] In *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973), this Court upheld the constitutionality of a city ordinance prohibiting a newspaper from publishing classified advertisements in sex-designated columns, a practice undertaken *by the newspaper* that *itself* constituted illegal sex-discrimination. The Court was careful to note, however, that it was the publisher's *own* policy of formatting its classified advertisements in sex-designated columns that constituted both the gravamen of the illegality and the basis upon which the First Amendment rights of the publisher could properly be required to yield. As the Court explained, "[n]othing in the modified order or the opinions below prohibits the newspaper from relying in good faith on the representation of an advertiser that a particular job falls within an exception to the Ordinance." *Id.* at 390 n.14.

The Court of Appeals' holding constitutes an unprecedented departure from this First Amendment jurisprudence. By declaring that "the First Amendment permits a state to impose upon a publisher liability for compensatory damages for negligently publishing a commercial advertisement," the Court of Appeals has, for the first time, permitted liability in damages to be imposed upon third-party disseminators of the commercial expression of others. Moreover, as discussed at pages 9-14 *infra*, the legal standard created by the Court of Appeals—that such liability may constitutionally attach whenever the expression at issue makes apparent to a jury "a substantial danger of harm to the public"—decidedly undervalues the "strength" of the third-party publisher's constitutional interest recognized by this Court in *Bigelow*, 421 U.S. at 828.

The impact of the Court of Appeals' holding will not be limited to the extraordinary facts surrounding SOF's publication of this classified advertisement authored by a Vietnam Veteran seeking employment. All types of entities—newspapers, magazines, "alternative" media, broadcasters, cablecasters, bookstores and librarians—distribute commercial material, created by others, which a jury might determine to pose "a substantial danger of harm to the public." In the wake of the Court of Appeals' decision, all of these third-party disseminators are exposed to suits seeking compensation for harms allegedly caused by the advertisements they publish.

Thus, libraries and bookstores that include in their collections catalogues advertising firearms, including assault weapons, are apparently now exposed to civil liability when a purchaser or borrower uses such a weapon in the commission of a violent crime.[4] *See Smith v. California*, 361 U.S. 147, 153 (1959) ("If the contents of bookshops and periodical stands were restricted to material of

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[4] *See, e.g., 1993 Gun Digest* at insert between pp. 240-41 (Ken Warner ed.) (47th ed. 1992) (advertisement for assault rifle models CAR-15, AR-15 and the "Ultramatch" manufactured by Olympic Arms/Safari Arms/S.G.W., Inc.).

which their proprietors had made an inspection, they might be depleted indeed."); *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 492-93 (1962). Similarly, newspapers and magazines that publish advertisements of legal, but potentially harmful procedures such as breast implants are, under the Court of Appeals' standard, presumably subject to suit by injured persons who claim to have been introduced to the procedure or its provider through the publication.[5]

Contrary to the Court of Appeals' decision, the lower courts have heretofore resisted such efforts to penalize those who disseminate the commercial speech of others to the public. In *Pittman v. Dow Jones & Co.*, 662 F. Supp. 921, 922 (E.D. La.), *aff'd*, 834 F.2d 1171 (5th Cir. 1987), for example, readers of the *Wall Street Journal* were rebuffed when they sought to hold the newspaper responsible at law for the money they lost investing in a company that advertised in the publication. As the *Pittman* decision illustrates, courts have heretofore "placed more value on the societal benefits of information availability than on the rights of private persons who claim to have been harmed" by its dissemination. *Id.* at 922.[6]

In a virtually identical case, the Fifth Circuit declined to impose liability on SOF when another Vietnam Veteran, who had placed a classified advertisement in the magazine as a "weapons specialist" seeking "high risk assignments," was hired, by someone who responded to his ad, and did in fact commit a murder. *See Eimann v. Soldier of Fortune Magazine, Inc.*, 880 F.2d 830 (5th Cir. 1989), *cert. denied*, 493 U.S. 1024 (1990). Although the

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[5] *See San Diego*, Nov. 1992, at 101.

[6] *Accord Walters v. Seventeen Magazine, Inc.*, 241 Cal. Rptr. 101 (Cal. App. 1987) (magazine aware of danger of tampons it advertised not liable to reader who purchased tampons and suffered toxic shock syndrome); *Yuhas v. Mudge*, 322 A.2d 824 (N.J. Super. 1974) (plaintiff, injured by fireworks purchased after reading advertisement for them in a magazine, could not state cause of action against magazine publisher).

Fifth Circuit did not reach the First Amendment issue, it nevertheless noted that "the possibility of illegal results" flowing from such an ad could not deprive a third-party publisher such as SOF of constitutional protection whenever the advertisement "could reasonably be interpreted as an offer to engage in illegal activity." *Id.* at 837.[7]

The Court of Appeals' standard, therefore, creates an unprecedented potential for litigation across the broad spectrum of information that is communicated to its intended audience by the host of third-party disseminators that populate contemporary society. The liability that will inevitably flow from such litigation is fundamentally at odds with the First Amendment's protection of freedom of speech and of the press. As this Court held in *Virginia State Board of Pharmacy*, "[i]t is precisely this kind of

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[7] The principle articulated by the courts in *Pittman* and *Eimann* extends as well to a host of claims against publishers and others based on various "harms" allegedly "caused" by their expression. Thus, in *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017 (5th Cir.), *cert. denied*, 485 U.S. 959 (1988), the Fifth Circuit rejected an attempt to hold *Hustler* magazine liable for the death of an adolescent allegedly caused by its publication of an article describing the practice of autoerotic asphyxia. In *Waller v. Osbourne*, 763 F. Supp. 1144 (M.D. Ga. 1991), the court held that the First Amendment precludes the imposition of tort liability on a musician and his record company following the suicide death of a teenager who purportedly acted on subliminal messages contained in the music. *Accord Zamora v. Columbia Broadcasting Sys.*, 480 F. Supp. 199, 206 (S.D. Fla. 1979) (court rejected claim that "violence" broadcast over television can support claim for damages where a minor has viewed such programming and reacted unlawfully on the ground that "[t]he imposition of such a generally undefined and undefinable duty would be an unconstitutional exercise by this Court"); *First Equity Corp. v. Standard & Poor's Corp.*, 670 F. Supp. 115 (S.D.N.Y.) (publisher of corporate securities information not liable to investor for errors in publication because "'[t]hose who are in the business of distributing the ideas of other people perform a unique and essential function. To hold those who perform this essential function liable, regardless of fault, . . . would severely restrict the flow of the ideas they distribute'") (citation omitted), *aff'd*, 869 F.2d 175 (2d Cir. 1989).

choice, between the dangers of suppressing information and the dangers of its misuse if it is freely available, that the First Amendment makes for us." 425 U.S. at 770.

II. THE COURT OF APPEALS' LIABILITY STANDARD LACKS THE REQUISITE CONSTITUTIONAL PRECISION AND THEREFORE THREATENS THE SECURITY OF PROTECTED SPEECH.

The constitutional infirmity of the Court of Appeals' standard is exacerbated by its inherent lack of precision. Such imprecise standards regulating expression offend the First Amendment because those whose words are to be regulated are left uncertain about where the line between protected and unprotected speech has been drawn and will often err on the side of "self-censorship." *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964).

When "speech falls close to the line separating the lawful from the unlawful," this Court has recognized, "the possibility of mistaken factfinding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized." *Speiser v. Randall*, 357 U.S. 513, 526 (1958). Thus, when fashioning a legal standard that marks "the line between speech unconditionally guaranteed and speech which may legitimately be regulated," *id.* at 525, courts must employ "sensitive tools," lest application of the standard in concrete cases yield "a forbidden intrusion on the field of free expression," *New York Times Co. v. Sullivan*, 376 U.S. at 285.

The Court of Appeals' standard, which purports to separate regulable expression—*i.e.*, commercial speech that creates a "substantial danger of harm to the public" —from expression that does not—and is therefore fully protected by the First Amendment—violates these basic constitutional precepts. On its face, the standard is limited neither to commercial messages that create a risk of harm from violent crime, nor to expression that creates a risk of harm from illegal conduct at all. Thus, publishers are left to attempt to apply the standard to any and all commercial expression that arguably poses a "sub-

stantial danger of harm to the public." Liquor,[8] tobacco products,[9] motorcycles,[10] and a host of other products all pose a danger of harm to the public, a danger that one segment of the population or another undoubtedly would consider to be "substantial." Commonplace classified advertising—for example, an ad listing rottweiler and pit bull pups for sale—can easily be characterized after-the-fact by a jury as posing a "substantial danger of harm" to a child who becomes the victim of a vicious attack.[11]

Moreover, the Court of Appeals' standard is not saved by requiring that the "danger" be "apparent" from the face of the advertisement. The health dangers of alcohol consumption and tobacco, the injuries resulting from motorcycle collisions, even the well-known risks associated with certain breeds of dogs and other pets, are no less "apparent" or "substantial" because they do not cause injury in all cases. Indeed, only one of the many services that Michael Savage offered to and in fact performed for respondents to his advertisement involved a danger of

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[8] *See, e.g., Business Week*, Nov. 9, 1992, at 51 (full page advertisement for Johnnie Walker Red Label Blended Scotch Whiskey); *San Diego*, Nov. 1992, at 125 (display advertisement for Brewski's Pub, offering Happy Hour seven days a week).

[9] *See, e.g., The Atlantic*, Nov. 1992, at inside back cover (full page advertisement for Carlton cigarettes); *Field & Stream*, Nov. 1992, at 43 (full page advertisement for Red Man chewing tobacco).

[10] *See, e.g., MotorCyclist*, Jan. 1993, at 46 (advertisement for "215-MPH" Kawasaki ZX-11 motorcycle: "HASTA LA VISTA! We've heard all the talk. But when Mr. Turbo spoke, the only sound was speed.").

[11] On November 8, 1992, the *Los Angeles Times* classified advertising section contained three ads for pit bulls and nine ads for rottweilers. *L.A. Times*, Nov. 8, 1992, at G4. That same day, the *Washington Post* ran three classified ads for pit bulls, thirteen ads for rottweilers, and one ad for rottweiler/pit bull mixed-breed puppies. *Wash. Post*, Nov. 8, 1992, at D19. The *Post* also reported that day that a six-month old pit bull puppy had mauled a seven-year old child. *Id.* at B7. The *Post* had previously reported numerous vicious attacks of children by rottweilers in the Washington, D.C. metropolitan area. *See id.* July 11, 1992, at B3; *id.* July 16, 1992, at B5.

substantial harm to anyone; certainly, the ad itself references a number of entirely benign tasks—*i.e.*, "bodyguard, courier"—that a "gun for hire" and "professional mercenary" could lawfully perform.

Third-party publishers saddled with the task of honoring the Court of Appeals' standard are asked to foresee all the potentially harmful uses and misuses of every display and classified advertisement submitted to them for publication. Such an obligation is, as a practical matter, impossible to perform because "nearly all human acts . . . carry some recognizable but remote possibility of harm to another," W. Page Keeton et al., *Prosser and Keeton On The Law of Torts* § 31, at 170 (5th ed. 1984).

The inherently subjective nature of the Court of Appeals' standard is illustrated by its application to the advertisement at issue in SOF's case. Even the three-judge panel below could not agree on the appropriate interpretation of the Savage ad, dividing over whether, on its face, the ad posed a "substantial danger of harm to the public." While all three judges (and the district court) appeared to agree that the ad does not contain an explicit offer to commit a crime, the majority concluded that its "combination of sinister terms makes it apparent that there was a substantial danger of harm to the public." 968 F.2d at 1121. By contrast, Judge Eschbach, based on his own review of the advertisement, reached the opposite conclusion. *See id.* at 1122 (Eschbach, J., dissenting). Despite its own internal disagreement as to the proper application of law to fact in this one case, the Court of Appeals would nevertheless have publishers perform the same kind of analysis and expect them to reach definitive conclusions.[12]

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[12] There is, for that matter, no principled distinction that can be drawn between the ad at issue in this case, and the one before the Fifth Circuit in *Eimann*. *See* Petition for Writ of Certiorari at 9-13. To rule in this case, as the majority of the Court of Appeals did, that a "combination of sinister terms," including "gun for hire," "professional mercenary" and "special skills," chosen by Savage differs in material respects from the ad for a "weapons

One consequence of the Court of Appeals' standard, therefore, is that whole categories of advertising, for perfectly lawful activities, will be deemed by third-party publishers to be too "dangerous" for them to disseminate, even though they are, in fact, fully protected by the First Amendment. Certainly, few publishers will be willing to risk the liability visited upon SOF in this case: in exchange for the approximately $46 that it cost Savage to place his classified ad, judgment has been entered against SOF in the amount of $4,375,000. The prospect of such liability will most assuredly encourage publishers to " 'steer far wider of the unlawful zone' " by declining to publish ambiguous advertising because of doubt whether its content is constitutionally protected as well as fear of the expense of having to prove such protection in court. *New York Times Co. v. Sullivan*, 376 U.S. at 279 (quoting *Speiser v. Randall*, 357 U.S. at 526). By the same token, many publications, especially smaller ones that cannot afford to forfeit advertising revenue and still survive, will inevitably find themselves defendants in expensive and time-consuming litigation where the risk of "mistaken factfinding," exacerbated by the imprecision of the Court of Appeals' standard, virtually ensures "that the legitimate utterance will be penalized." *Speiser v. Randall*, 357 U.S. at 526.

Indeed, the incidence of such litigation can be expected to fall disproportionately on those publications, such as SOF, that give voice to the kind of unpopular, disagreeable or controversial viewpoints that are most likely to be treated harshly by juries.[13] Not only can a civil jury

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specialist-jungle warfare . . . high risk assignments" at issue in *Eimann*, confirms either that the Court of Appeals' standard is too finely calibrated to admit of meaningful application or, more likely, that it is, as a practical matter, no standard at all.

[13] It is not without constitutional significance that the jury's award in this case, if permitted to stand by this Court, will most likely require SOF to close its doors and abandon its magazine. It is also not without significance that SOF has traditionally provided an important forum for the dissemination of information and

be expected to find the necessary "substantial danger of harm" more readily when the publisher, not to mention its advertisers and readers, operates outside the "mainstream," but a lucrative (and crippling) judgment is often more attainable when the jury is afforded an opportunity to express its own antipathy for the publisher and its "kind" through the size of its damages award.[14]

It is, moreover, entirely to be expected that a variety of special interest groups will seek to take advantage of the Court of Appeals' standard by targeting for litigation those publications that cater to groups, ideas or political viewpoints with which they disagree. The prospects for such cause-related litigation based upon the Court of Appeals' constitutional standard are neither far-fetched nor terribly difficult to hypothesize. The *Washington Blade*, a weekly newspaper serving the Washington, D.C. homosexual community, regularly publishes classified ads which the organized opponents of gay rights would no doubt

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views within one of the most neglected segments of American society, the community of Vietnam Veterans. Indeed, the issue of SOF that contained the classified ad at issue addressed as well a number of important and controversial topics, from a nine-page article advocating the cause of freedom fighters in Afghanistan to a seven-page article recounting the career of Nazi commando Otto Skorzeny. *Cf. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. at 383 (noting that the ordinance at issue there neither threatened the newspaper's "financial viability" nor "impair[ed] in any significant way its ability to publish and distribute its newspaper").

[14] *See Hustler Magazine v. Falwell*, 485 U.S. 46, 55 (1988) ("'Outrageousness' in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression."); *Herceg v. Hustler Magazine, Inc.*, 814 F.2d at 1024 (noting "substantial concern that the worthiness of speech might be judged by majoritarian notions of political and social propriety and morality."). *Cf. R.A.V. v. City of St. Paul*, 112 S. Ct. at 2542 ("The First Amendment generally prevents government from proscribing speech, . . . or even expressive conduct, . . . because of disapproval of the ideas expressed.").

characterize as proposing and encouraging illicit, immoral and otherwise "harmful" sexual relationships.[15] Even publications such as *Guns & Ammo* and *Field & Stream*, which publish commercial advertisements promoting firearms and hunting, could become inviting targets for anti-gun coalitions and animal-rights activists.[16] In the last analysis, therefore, the standard of liability embraced by the Court of Appeals, as a direct consequence of its inherent lack of the requisite constitutional precision, places at risk the First Amendment freedoms of those publishers most in need of protection.

III. THE DECISION BELOW DIMINISHES THE FREE FLOW OF INFORMATION AND THE ABILITY OF THE AVERAGE AMERICAN TO COMMUNICATE TO A BROAD AUDIENCE.

"The First Amendment's concern for commercial speech is based on the informational function of advertising." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. at 563. In practical terms, however, advertising and the revenue it generates facilitate not only the dissemination of commercial speech to an interested public, but also finance the publication of news and editorial commentary. *See Vaill v. Oneida Dispatch Corp.*, 493 N.Y.S.2d 414, 416 (Sup. Ct. 1985) ("The classified advertisements which run in [the] newspaper serve at least two functions

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[15] *See, e.g., Wash. Blade*, Nov. 6, 1992, at 84 ("FUN, SAFE SEX partner wanted by GWM, 5'7", 150#, 39, HIV+ (asymptomatic). Let's explore mutual fantasies from spandex to jockstraps!"); *cf. The Village Voice*, Nov. 10, 1992, at 144 ("INTERRACIALLY INCLINED? Me, too!! Golden-hearted SWM, handsome, tall, slim sks the pleasant company of a pretty, passionate SF. If you don't call, we'll never meet.").

[16] *See, e.g., Guns & Ammo*, Dec. 1992, at 105 ("ILLINOIS RESIDENTS ONLY Lowest gun prices! Glock-17, $459.95; Beretta-92FS, $469.95; Sig-P226, $609.95. All makes, models. FREE price list. Call M&R SPORTS (312) 321-9076."); *Field & Stream*, Nov. 1992, at 120 (TRAPPERS: FURS ARE UP! Send $1.00 (Refunded first order) for our catalog and learn how you can receive $20.00 lure FREE. Dailey's, Box 38B, Union Hill, NY 14563.").

—they are an integral part of and facilitator of commerce in the area served by the paper, and they underwrite in part the cost of publication of the news-carrying vehicle.").

The importance of advertising generally—and classified advertising in particular—to a free press cannot be overstated. In 1991, over $30.4 billion of advertising was placed in newspapers in the United States, and over one-third of this amount—some $10.5 billion—was attributable to classified advertisements alone.[17]

The sheer volume of classified advertisements placed in newspapers is astounding. On Sunday, November 8, 1992, for example, the classified ad section of the *New York Times* was 52 pages long; the *Los Angeles Times* also ran 52 pages of classified ads that day, and the *Washington Post* published 69 pages of classifieds. These three newspapers alone disseminated approximately 69,000 classified ads on that typical Sunday.

Newspapers and magazines with considerably smaller circulation also publish a daunting number of classified ads. The November 10, 1992 edition of *The Village Voice*, a weekly newspaper published in New York, contained 27 pages of classified ads, totaling approximately 4000 ads. The *Alexandria (Virginia) Port Gazette Packet*, a community newspaper, prints approximately 700 to 800 classified advertisements each week and the *Citizen Tribune* of Morristown, Tennessee disseminates some 9,000 classified ads every month. The November 1992 edition of *Philadelphia* magazine included over 450 classified advertisements, while *New York* magazine's November 16, 1992 weekly edition contained six pages of classified advertisements, approximating over 600 separate ads.

To expect most publishers to undertake the kind of review contemplated by the Court of Appeals for the millions of classified advertisements that are published

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[17] Editor & Publisher, *1992 Editor & Publisher Yearbook*, at unnumbered p. 6.

each year in this country is wholly unrealistic. Beyond the sheer volume of classified advertisements submitted for publication, publishers typically operate with limited resources and under tight deadlines. Advertisements often appear in print "within a matter of hours after their submission for publication." *See Vaill v. Oneida Dispatch Corp.*, 493 N.Y.S.2d at 416. Moreover, staffs large enough and with the requisite training to perform the kind of review contemplated by the Court of Appeals would increase the cost of publishing, and purchasing, such advertising exponentially.[18]

Larger, more profitable publications may be able to hire and train a sufficient number of additional employees to review the classified ads they disseminate, but the price of doing so would undoubtedly be passed along to the advertiser and would likely place the classifieds out of the reach of many people. Local newspapers with considerably smaller circulations will be faced with an even more difficult dilemma.[19] Without sufficient staff to re-

[18] Even at large newspapers, it is unrealistic to expect the kind of scrutiny of classified advertising apparently contemplated by the Court of Appeals. While some classified ads appearing in major newspapers are submitted in writing, many are placed over the telephone, with the text of the ad simultaneously typed into a computer by the clerk who answers the telephone. The clerks, many of whom are not college graduates, act as both proofreaders and typesetters for the ad. A computer organizes all the ads into appropriate classifications and places them in alphabetical order. At press time, the ads are downloaded and placed on boards for printing.

[19] Of the 1,586 daily newspapers published in the United States, 1,336 have circulations less than 50,000, 1,089 have circulations less than 25,000, and 631 have circulations less than 10,000. Editor & Publisher, *1992 Editor & Publisher Yearbook*, at unnumbered p. 8. Moreover, among the 5,000 daily and weekly community publications that comprise the membership of *amicus* National Newspaper Association, the publisher is often also the editor, the advertising manager, the business manager, and/or the reporter. To require such a publication to hire just one additional employee can literally make the difference between continued operations and shutting down the presses.

view every classified ad submitted, but also lacking the resources to hire and train additional employees, these small publishers may be compelled to abandon classified advertising altogether,[20] assuming they can afford to forego even the modest revenue such ads generate.[21]

In either case, the Court of Appeals' standard will restrict the availability and affordability of classified advertising, which presently constitutes perhaps the only forum for the dissemination of information to a broad audience that is accessible by virtually all Americans. Any person can place a classified ad in a newspaper that reaches an entire local community for a relatively minimal amount, especially compared to the cost of other forms of advertising. Moreover, newspapers with national circulations (such as the *Wall Street Journal*, *New York Times*, and *USA TODAY*) now make it possible for an individual to place, for a modest fee, a classified advertisement that will be read by millions of people all over the United States, as well as abroad.[22] Thus, the cost of a classified ad ranges from $0.65 per line in community newspapers (or well under $10 for an average classified ad), to $36.60 per line (or $146.40 for a typical four

[20] SOF discontinued all "personal" classified advertising in the wake of litigation such as the instant case, *see* Petition for Writ of Certiorari, at 4 n.8, despite the fact that the overwhelming majority of such ads it published made, by any measure, valuable contributions to the free flow of information. *See, e.g.*, *Soldier of Fortune*, June 1985, at 111 ("FIREBASE RIPCORD VETS: Writer needs information, memories, etc., for book on July 1970 battle. Contact: JIM FAIRHALL, 24 Fenwick St., Greenlawn, NY 11740"); *id.* at 110 (DALE: How about letting me know you're safe? BETTY, PO Box 180982, Austin, TX 78718-0982.").

[21] It should be noted that 29 newspapers discontinued publication in 1991 alone. *See* Editor & Publisher, *1992 Editor & Publisher Yearbook*, unnumbered p. 2.

[22] Some smaller newspapers also provide their advertisers with the potential for reaching a greater audience by joining statewide advertising services through which an individual can place a classified advertisement in all of his state's newspapers—rather than solely in his local paper—at an affordable price.

line ad), which is the cost of placing a classified in a Sunday edition of the *New York Times*. A typical classified advertisement in *New York* magazine, at $33 per line, costs $231, and in *The Village Voice*, at $9.88 per line, approximately $60.

By contrast, few individuals have the financial means to broadcast their message by advertising over the electronic media, simply because the cost is prohibitive. During the 1992 presidential campaign, for example, H. Ross Perot reportedly paid over $2.9 million to broadcast his "infomercials" for just two hours during prime time on the major networks.[23]

Display advertising in the print media is also enormously expensive. A full-page advertisement in a national publication such as the *Wall Street Journal* costs nearly $50,000. Display advertising in newspapers with significantly smaller readership is also costly. The *Prince George's County Journal*, which estimates its daily subscribers to number 38,000, charges $27 per column inch for its display advertising, rendering the cost of a half-page ad $1,620. *Philadelphia* magazine charges $250 per column inch to publish display advertising.

Given the ready availability of classified ads as an affordable and efficient way to communicate almost any kind of message to the public, it is not surprising that the classifieds cover an enormous array of subjects. In addition to the "help wanted" and "real estate" classifieds that tend to dominate the Sunday editions of major newspapers, classified ads also announce the availability of cars, boats, livestock, antiques, pets, machinery, business opportunities, tickets to events, vacation and travel opportunities, and second-hand merchandise of all kinds. Small businesses and individuals looking for work describe the services they have to offer.[24] New and expand-

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[23] *See Atlanta J. & Const.*, Nov. 3, 1992, at A5.

[24] *See, e.g., New York*, Nov. 16, 1992, at 144 ("Ms. Julie Diamond —Expert Relaxation Techniques/Role-Play. 212-458-3888"); *Detroit Monthly*, Nov. 1992, at 109 ("CEREMONIALIST specializing

ing businesses advertise their need for capital.[25] The classifieds published in alternative newspapers describe educational opportunities, as well as jobs for aspiring singers, dancers, writers, actors and models.[26] An increasing number of newspapers and magazines publish impressive numbers of classified ads that communicate religious and political messages,[27] as well as solicitations for volunteer, social and support groups.[28] Classified ads

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in personalized wedding ceremonies. Non-sectarian or Jewish ceremonies; willing to co-officiate. Janis Levin-Gorelick, AHA, Chaplain, 626-4019"); *Alexandria Port Gazette Packet*, Nov. 19, 1992, at 58 ("HAULING trash & debris, yard work, garage & bsment cleaning. CALL ANYTIME, (703)451-1692.").

[25] *See, e.g.*, *Wall St. J.*, Nov. 19, 1992, at B14 ("$150K Wanted For 6 Months to Finance Government Contract. $35K interest. Principals only. 800-452-1988"); *Success*, Nov. 1992, at 80 ("WEALTHY INVESTORS seek business finance proposals. No front fee. (615) 573-4655").

[26] *See, e.g.*, *The Village Voice*, Nov. 10, 1992, at 127 ("ACTORS/ACTRESSES, DANCERS, KIDS Needed immed. for print work & major motion pictures. No experience. Also, beautiful hands, hair & faces for jewelry ads. 212-675-9150"); *Rolling Stone*, Nov. 26, 1992, at 83 ("MUSICIANS NATIONAL REFERRAL Professional bands and musicians seeking each other. Working band register free. 1-800-366-4447").

[27] *See, e.g.*, *The Village Voice*, Nov. 10, 1992, at 122 ("MAY THE SACRED HEART of Jesus be adored, glorified, loved & preserved in the world now & forever. Sacred heart of Jesus pray for us. St. Jude helper of the hopeless pray for us. St. Jude worker of miracles pray for us. Say 9 times ea day for 9 days. Publish when granted."); *City Paper*, Nov. 20, 1992, at 89 ("STOP APARTHEID in America. Volunteers are needed to make a difference. Call now! 202-882-7711. A.C.T.I.O.N. Cooperative for Human Development. The People's National Domestic Peace Corps. Be part of the solution."); *id.* ("Help defend Washington area abortion clinics against Operation Rescue this January, on the 20th anniversary of *Roe v. Wade*! Call WACDTF, 202/728-7563.").

[28] *See, e.g.*, *City Paper*, Nov. 20, 1992, at 89 ("Volunteers urgently needed to tutor, play and just be friends w/children who don't have any. Call 202/610-1055 or 202/678-1954."); *Wash. Blade*, Nov. 6, 1992, at 73 ("THE SUMMA PROJECT is now Whitman Walker Clinic of Suburban Maryland. Please contact us at our new office:

are also placed by book publishers seeking manuscripts, by writers looking for collaborators, and by couples searching for children to adopt.[29]

Thus, the classifieds unquestionably perform an important and salutary role in our system of freedom of expression. They provide virtually all of us with a viable outlet through which we can afford to communicate to a broad audience of our fellow citizens. As Justice Black noted in *Associated Press v. United States*, 326 U.S. 1, 20 (1945), "[f]reedom to publish means freedom for all and not for some," but it is often a freedom that "can be exercised only by those who have effective access to the press," *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 251 n.17 (1974) (citing A. MacLeish, in W. Hocking, *Freedom of the Press* 99 n.4 (1947)). The Court of Appeals' decision in this case, if permitted to stand, will go a long way toward limiting effective access to the press and will thereby render all of us that much less free.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge this Court to grant the Petition for Writ of Certiorari and reverse the judgment of the Court of Appeals.

7676 New Hampshire Ave., Suite 111, Langley Park, MD 20783 or call (301) 439-0731.").

[29] *See, e.g.*, *New York Times Book Review*, Nov. 22, 1992, at 42 ("MANUSCRIPTS WANTED Subsidy publisher with 70-yr tradition 212 541-3881"); *The Village Voice*, Nov. 10, 1992, at 143 ("SWM screenwriter seeks counterpart with an interest in the romantic comedy/love story genres with whom to bounce off ideas, exchange criticism and possibly form a collaborative partnership"); *Philadelphia*, Nov. 1992, at 162 ("ADOPT: The best possible home is waiting . . . A beauty life awaits with loving couple who want to give a newborn everything you would if you could. Medical/Legal expenses paid. To get to know us, call Roe and Joe 1-800-524-5488 anytime.").

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APPENDIX

IDENTITY OF INDIVIDUAL AMICI

The National Newspaper Association ("NNA") is a national trade association representing the interests of weekly and daily newspapers throughout the country. Founded in 1885 and with almost 5,000 members, NNA is the oldest and largest national trade association in the newspaper industry. For more than a century, a major concern of NNA has been to ensure that political and commercial information be distributed in an open and robust manner.

The Alabama Press Association represents daily and non-daily newspapers in the State of Alabama. The Alabama Press Association is deeply concerned about the effects that the judgment rendered by the Court of Appeals in this case will have upon the First Amendment rights of newspaper publishers in Alabama and other states comprising the Eleventh Circuit.

The American Booksellers Foundation for Free Expression ("ABFFE") was organized in 1990. The purpose of ABFFE is to inform and educate booksellers, other members of the book industry and the public about the dangers of censorship and to promote and protect the free expression of ideas, particularly freedom in the choice of reading material.

The Association of Alternative News Weeklies ("AAN") is a non-profit corporation whose members include over 80 metropolitan newspapers with a combined weekly circulation of over four million. The members of AAN are vitally interested in the free and unfettered flow of information, both editorial and commercial, to their readers.

The Freedom to Read Foundation ("Foundation") is a non-profit organization established in 1969 by the American Library Association. The Foundation was established to promote and defend First Amendment

rights; foster libraries as institutions fulfilling the promise of the First Amendment for every citizen; support the right of libraries to include in their collections and make available to the public any work they may legally acquire; and set legal precedent for the freedom to read of all citizens. Thus, the Foundation seeks to ensure that *all* First Amendment rights are protected from encroachment by government or other individuals. The Foundation actively supports and defends the right of all citizens to unhampered exercise of these First Amendment rights.

High Times Magazine has been publishing a counterculture monthly magazine for over 15 years with a large circulation. High Times editors' policy has always supported the free and open exchange of all ideas—particularly unpopular ones—in the belief that a better educated populace makes for a more democratic country.

The Magazine Publishers of America, Inc. is the major trade association of magazine publishers, including in its present membership 240 publishers who publish over 1200 weekly, bi-weekly and monthly magazines sold at newsstands and by subscription, both here and abroad.

News World Communications, Inc. owns and publishes *The Washington Times*, a newspaper of general circulation in the Washington, D.C. metropolitan area and elsewhere.

The Newsletter Publishers Association, Inc. ("NPA") represents 650 publishers of newsletters and specialized information services. The NPA has long worked to preserve the First Amendment rights of newsletter and other publishers.

The Radio Television News Directors Association is the principal professional organization of journalists—executives, editors, reporters and others—who gather and disseminate news and other information on radio and television in the United States.

Time Inc. is the largest publisher of general interest magazines in the United States. Among the magazines it publishes are TIME, LIFE, FORTUNE, SPORTS ILLUSTRATED, PEOPLE, MONEY and ENTERTAINMENT WEEKLY.

VV Publishing Corporation, a New York corporation, publishes *The Village Voice*, a weekly newspaper having a circulation in excess of 175,000 in the New York metropolitan area. Published for more than thirty-five years, *The Village Voice* is now the largest weekly newspaper in the United States, and many of its articles are regularly syndicated and republished in various forms throughout the country and the world.